SUPREME COURT, U.S.
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No. 96-

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

FÉLIX APONTE-VELÁZQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a federal criminal defendant denied his right to appeal, requiring a new trial, when the official court reporter has lost almost all of the verbatim record of the last two days of the trial, no reconstruction of the government's rebuttal closing is possible, and the defendant is represented by different counsel on appeal?

2. Does the due process clause permit affirmance of a federal criminal conviction when the prosecutor knowingly fails to correct a key witness's perjury, on the basis that the witness conceded some other points on cross-examination tending to undermine his credibility to a lesser extent?

3. In the face of conceded "plain error" in the failure to instruct the jury not to draw any adverse inference from the defendant's decision not to testify, may a federal court of appeals nevertheless affirm on the basis that the error did not "seriously affect the fairness of the proceedings," because the "uncontradicted evidence" from heavily-impeached informant witnesses was "overwhelming"?

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Félix Aponte-Velázquez and the United States). Rodrigo Brand and Carmelo Pulliza-Delgado were codefendants in the district court and were parties to the appeal. Neither is a party to this petition. There were many other co-defendants on the indictment, but none of them exercised their right to trial.

REASONS FOR GRANTING THE WRIT

1. The Circuits are divided on the question whether a new trial must be granted when no adequate record can be produced of a federal criminal trial, and the defendant is represented on appeal by new counsel. In any event, the court of appeals' decision in this case that plain error in the prosecutor's rebuttal closing that would warrant reversal cannot be imagined is contrary to this Court's precedent. 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FÉLIX APONTE-VELÁZQUEZ respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on March 26, 1996, affirming his convictions in the District of Puerto Rico for controlled substance offenses.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit, filed on March 26, 1996 (per Aldrich, S.J., with Selya, J., and Coffin, S.J.), affirming petitioner's convictions on direct appeal, is published sub nom. United States v. Brand, 80 F.3d 560. A copy is attached as Appendix A. There is no published opinion of the District Court. An unpublished Order of the district court containing findings pertinent to one issue raised in this petition is attached as Appendix B.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the First Circuit was filed March 26, 1996.

Appx. A. On May 2, 1996, the court of appeals denied the applicant's petition for rehearing. Appx. C. By Order dated July 23, 1996, under Docket No. A-40, Justice Souter granted petitioner's timely filed application for an extension of time within which to file this petition for writ of certiorari, to and including September 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; ...."

Title 18 of the United States Code provides, in part:

> **§ 3481. Competency of accused**
>
> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own

request, be a competent witness. His failure to make such request shall not create any presumption against him.

Rule 52 of the Federal Rules of Criminal Procedure provides, in part:

Harmless and Plain Error

* * * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

This petition presents issues that arose during and after a jury trial on federal charges of conspiracy to import and distribute cocaine.

a. Procedural History

In February 1993, a grand jury in the District of Puerto Rico returned a 19-count indictment charging nine defendants with various cocaine offenses. The petitioner, Félix Aponte-Velázquez, was not named in that original indictment. Four months later, on June 18, 1993, the grand jury returned a sealed, superseding indictment, charging 31 defendants in 48 counts. Petitioner Aponte was named as the eleventh defendant in that superseding indictment,

charged in only three counts. CA1 J.A. 37-111.[1]

Count One charged that petitioner and his co-defendants were members of a conspiracy, existing from September 1991 until March 1993, in violation of 21 U.S.C. § 846, to possess in excess of 2000 kilograms of cocaine with the intent to distribute them as prohibited by id. § 841(a). CA1 J.A. 40-60. Count 26 charged that petitioner and the co-defendants were also members of a conspiracy, existing during the same time period, from September 1991 until March 1993, in violation of 21 U.S.C. § 963, to import in excess of 2000 kilograms of cocaine into the United States as prohibited by id. § 952. CA1 J.A. 83-88. Count 27 of the superseding indictment charged that on or about September 25, 1991, petitioner and five co-defendants did import some 596 kilograms of cocaine, in violation of id. § 952. CA1 J.A. 88-89. Two days after the indictment was unsealed, petitioner surrendered himself and was released on bail. CA1 J.A. 10-13.

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[1] "CA1 J.A." refers to the Joint Appendix filed in connection with the First Circuit appeal below. Materials that were attached as Addenda to petitioner's brief as appellant below are referenced in this petition as "CA1 Aplt. Add'm E(1)," for example.

A jury trial before Judge José Antonio Fusté was held during five days in late September and early October 1993. Closing arguments and the jury charge were delivered on October 1, CA1 J.A. 266, but as explained below there is no transcript available; the jury retired to deliberate and returned verdicts of guilty on all three counts later that day. CA1 J.A. 253. Petitioner was detained upon return of the verdict.

Although found to be a "minor participant," petitioner, a 40-year-old first offender, was sentenced on March 21, 1994, to serve 188 months (15 years, 8 months) of imprisonment, followed by supervised release of five years. Judgment was filed that day and entered on the docket April 7, 1994. A timely appeal to the First Circuit was noticed on March 28. CA1 J.A. 318.

Transcripts of most of the testimony were produced during trial. Undersigned counsel entered the case in May, 1994, and immediately ordered the balance of the transcript. Tragically, petitioner's prior defense counsel, José Antonio (Abi) Lugo, Esq., died in an accident several months after the notice of appeal was filed. After many months of inaction and evasive responses by the Clerk's Office and court reporter to new counsel's inquiries, it was revealed that the transcripts of the final day and a half of trial, including petitioner's defense

witnesses, the government's rebuttal case, most of the closing arguments, and the court's charge to the jury and answer to the jury's question, were irretrievably lost. Appx. B; CA1 J.A. 319.

Petitioner's motion for summary reversal on this basis was denied, and the court of appeals remanded the case under Fed.R.App.P. 10(c) to attempt a reconstruction of the record. After a hearing held April 6, 1995, in the district court, Judge Fusté filed a memorandum setting forth his findings. Appx. B. Neither the final witnesses' testimony nor the prosecutor's rebuttal argument were actually reconstructed.

On appeal, a panel of the First Circuit affirmed by published opinion. Appx. A. The court held, inter alia, that it could not imagine how reversible "plain error" could have been committed during the prosecutor's rebuttal closing argument. The court also held that the prosecutor's failure to correct known perjury by the government's key informant witness concerning his motivation to cooperate was harmless in light of certain other statements of the witness during cross-examination.[2] Finally, the court conceded that the trial court

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[2] As discussed below, the court of appeals took these statements badly out of context.

committed plain error in failing to charge the jury on its duty not to draw adverse inferences from the defendant's choice not to testify, but declined to reverse under Fed.R.Crim.P. 52(b) on the basis that the evidence (from heavily-impeached informant witnesses) was "uncontradicted" and "overwhelming." Appx. A23.

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed after sentencing although prior to the entry of judgment. Fed.R. App.P. 4(b). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses.

b. Statement of Facts

In August 1991, a Colombian known as "Johnny," among other names, came to Puerto Rico to arrange a shipment of cocaine. He met there with Wilfredo ("Andin") Caicedo and his partner, Jorge ("Georgie") Hernández Miller. The two local ringleaders, Caicedo and Hernández Miller, later became government witnesses and testified against petitioner Aponte and other accused underlings who stood trial.

Hernández Miller testified that petitioner Félix Aponte, sometimes called

"Papo Subaru," participated in the August meeting and offered to recruit fishermen to help unload the cocaine. Hernández Miller's partner, Caicedo, directly contradicted this, stating that Aponte was not involved at that time, or even during the first part of September. 9/22 Tr. 108. In any event, the conspirators apparently came under almost immediate governmental scrutiny.

Around September 20, according to Hernández Miller, "Johnny" said that "his people" in Colombia were ready. On September 24, sacks of cocaine were taken off a boat and brought onto shore, totalling 596 kilograms. Later, the cocaine was taken to petitioner's home, where it remained in pickup trucks parked near a shed in the back of the house. The next day, Hernández Miller, "Johnny" and Caicedo went to petitioner's house to take the cocaine away. "Johnny" paid petitioner with cocaine for himself and the fishermen. Hernández Miller also testified that he was paid with 21 kilos.

On September 27, 1991, four conspirators flew from Puerto Rico to Miami to deliver suitcases of cocaine to Caicedo, who turned it over to another Colombian. The next day, September 28, two messengers carried more cocaine-filled suitcases to Miami, but they were intercepted and arrested, as was Caicedo who was waiting outside the terminal.

Undeterred, "Johnny" called Hernández Miller again in October or

November 1991 to arrange another shipment. Again, petitioner is said to have arranged for a house to store the cocaine. Fishermen unloaded about ten multi-kilo bags; Hernández Miller testified he and petitioner drove the load to San Juan, leaving one bag behind as payment for the fishermen.

Over objection on the basis of surprise, Hernández Miller testified there was a third cocaine shipment in February 1992. Hernández Miller testified that he and "Johnny" attempted to recruit petitioner again to make arrangements for fishermen to pick up the cocaine from the boat, but did not find him.[3] This shipment involved 14 bales of cocaine, containing 25-35 kilos of cocaine each. Because of various problems with the reloading and storage phase, at least 18 kilos out of this load were subsequently stolen. As a result, Hernández Miller claimed, he was not paid.[4]

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[3] Accordingly, the prosecutor conceded at the time of sentencing that "There is no evidence to say that [Mr. Aponte] was involved in that March [sic] 1992 load."

[4] The prosecutor complained at this point in eliciting the testimony that he had not had sufficient time to debrief Hernández Miller on this subject, which he therefore did not pursue further. CA1

Jose A. Morales, a Puerto Rico police officer assigned to work with DEA, testified that when he executed a search warrant on June 21, 1993, at the residence of Jorge Hernández Miller, he found life insurance policies, one of which insured petitioner's life.

Petitioner called as a defense witness Puerto Rico police officer Miguel Díaz Sánchez, who had debriefed Hernández Miller. Officer Díaz testified that some of Hernández Miller's statements in the debriefing differed from his trial testimony. Officer Díaz also testified that Hernández Miller spoke of murders, but he was not asked to elaborate on this

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J.A. 185-86. The defense claimed that Hernández Miller subsequently ordered and oversaw the murder of those he suspected of stealing the 18 kilos (and thus depriving him of his pay for the third load), but the lower court severely limited the defense's effort to show bias on this basis. The case agent acknowledged that in interviewing Hernández Miller, he declined to pursue the issue of the murders. Eight months later, at another, related trial, the same prosecutors presented witnesses who testified that Hernández Miller had admitted to them that the amount stolen was 80 kilos, not 18, and that he had indeed ordered those murders. CA1 J.A. 324-59.

subject. Petitioner also called three character witnesses, but there is no transcript or reconstruction of their testimony. CA1 J.A. 264.

The government called three witnesses on rebuttal, CA1 J.A. 264, but again, there is no record at all of who they were (other than their names) or what they may have said on direct or cross-examination.

REASONS FOR GRANTING THE WRIT

1. The Circuits are divided on the question whether a new trial must be granted when no adequate record can be produced of a federal criminal trial, and the defendant is represented on appeal by new counsel. In any event, the court of appeals' decision in this case that plain error in the prosecutor's rebuttal closing that would warrant reversal cannot be imagined is contrary to this Court's precedent.

As the Court below noted, Appx. A, 80 F.3d at 563, the Circuits are in conflict on the question whether a federal criminal conviction can be affirmed in the absence of an adequate record of the trial proceedings, where the defendant-appellant is represented by different counsel on appeal than at trial. In the Fifth and Eleventh Circuits, reversal and a new trial are

always deemed necessary in these circumstances when the missing portion is "substantial and significant," United States v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977), and any reconstruction achieved is nevertheless short of being "substantially verbatim." United States v. Pace, 10 F.3d 1106, 1124-25 (5th Cir. 1993), cert. denied, 114 S.Ct. 2180, 128 L.Ed.2d 899 (1994). Accord, United States v. Preciado-Cordobas, 981 F.2d 1206, 1212 (11th Cir. 1993). Other circuits disagree. See Appx. A6. This Court should grant certiorari in this case to resolve the difference in rules.

Judge Fusté himself recognized in his October 19, 1994, letter to undersigned counsel that the missing transcript "is an obvious necessity" in this case, particularly because of the untimely and tragic death after trial of petitioner's trial counsel. CA1 Aplt. Add'm E(1). That insight echoes this Court's sentiments as expressed in Hardy v. United States, 375 U.S. 277 (1964): "[W]hen, as here, new counsel represents the [defendant] on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript?" Id. at 279-80.

Even if this court were not to adopt a per se rule, the decision below would be wrong, and in conflict with decisions in other circuits and by this Court

itself. The critical missing part of the record here is the prosecutor's rebuttal. In Selva, supra, the Fifth Circuit reversed and ordered a new trial, because no verbatim transcript of closing arguments existed and no substantially verbatim equivalent could be recreated. The same is true here. As the Fifth Circuit later noted, discussing Selva, "trial counsel's closing arguments" are "almost impossible to reconstruct in a substantially verbatim manner." Pace, supra, 10 F.3d at 1125. The inability of the lower court to reconstruct the prosecutor's rebuttal argument alone should have required reversal.[5]

This Court has recognized that "no aspect of [trial] advocacy could be more important than the opportunity to marshal the evidence ... before submission of the case ...." Herring v. New York, 422 U.S. 853, 862 (1975). In this particular case, the fact that Judge Fusté recalled no counsel's objecting to the rebuttal is less significant than it might seem. During the same year as this trial, the same court of appeals found plain error and reversed several convictions based on misconduct in the closing arguments of

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[5] The missing witness testimony does not seem to have been critical, and the jury instructions and principal government closing were adequately reconstructed.

the same prosecutor in another drug trial. See Arrieta-Agressot v. United States, 3 F.3d 525 (1st Cir. 1993).

Yet the court below concluded, "We are hard-pressed to conceive what sort of illegitimate argument could have been made during these few moments that might have 'so poisoned the well that the trial's outcome was likely affected.'" Appx. A-7; 80 F.3d at 564. This Court has carefully examined prosecutors' arguments for plain error, clearly recognizing that it is far from inconceivable that such error may exist. United States v. Robinson, 485 U.S. 25 (1988); United States v. Young, 470 U.S. 1 (1985). Plain error may well have occurred in this case as well.

The burden ultimately falls upon the government to assure the accused an adequate appellate record. See Mayer v. Chicago, 404 U.S. 189, 195 (1971). Under the approach taken below, that burden was effectively and unconstitutionally shifted to the defense. Without that transcript of rebuttal argument, petitioner Aponte could not receive the benefit of full appellate representation by counsel or review by the court of appeals.

For all these reasons, this Court should grant this petition for certiorari and reverse the judgment of the United States Court of Appeals for the First Circuit.

2. The decision below conflicts with this Court's cases and with the view of other Circuits in excusing the prosecutor's failure to correct his witness's known perjury.

The principal witness against petitioner Aponte had decided on the eve of trial to testify for the government when he was confronted with the fact that other alleged co-conspirators were accusing him of participating in a "massacre." Outside the presence of the jury, the prosecutor admitted that the witness was motivated to testify against petitioner by a desire to avoid prosecution for these murders, and the witness had admitted this to defense counsel during a pretrial interview. Yet on the witness stand the witness claimed that his only motive for testifying was to tell the truth and clear his conscience, and the prosecutor took no action to correct this falsehood.

In Napue v. Illinois, 360 U.S. 264 (1959), this Court unanimously stated:

> [A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall .... The same result obtains when the State, although not soliciting false

> evidence, allows it to go uncorrected when it appears.
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.

Id. at 269. Accord, United States v. Bagley, 473 U.S. 667, 679 n.8 (1985).

The court below found it "sufficient" that the witness, "Georgie" Hernández Miller, acknowledged "believing the plea agreement meant that 'if I speak about things of which I have knowledge or in which I have taken part, I wouldn't be indicted for them," and "would be sentenced to fewer years." Appx. A-14; 80 F.3d at 566. These quotations misrepresent the record, for they are taken out of context. The witness's perjury in this case was not about the terms of his plea agreement, but about his motivation suddenly to become a government witness. Replaced in their full setting, it can be seen that the witness denied being motivated by a desire for immunity; this was the heart of the known lie:

> Q: ... What are you getting in exchange for your testimony?

A: I believe that if I speak about things of which I have knowledge or in which I have taken part, I wouldn't be indicted for them.

Q: And that was a very important concern in your signing a plea agreement and becoming a government witness, is that correct?

A: No, sir.

Q: That was not a consideration in your mind?

A: No, sir, I did not.

Q: You testified or you became a government witness only because you are repentant?

A: I repent my crimes. I would like to return to my family before too many years go by and I am over here to tell the truth.

CA1 J.A. 193-95 (emphasis added). These passages, and not those quoted by the panel, contain the testimony which the prosecutors knew to be false. See CA1 J.A. 169-70.

The court below apparently excused the government's failure to fulfill its

due process duty on the basis that the first part of this sequence of answers afforded a basis to conclude that the following parts were untrue. But that is not the test; knowing that this key witness had lied in a self-serving way could have affected the jury's willingness to doubt his credibility. Yet rather than correct the false testimony, the government urged the jury in closing to believe Hernández Miller. CA1 J.A. 224.

The opinion below fails to acknowledge that the defense in this situation is given the benefit of a friendly standard. See Kyles v. Whitley, 514 U.S. --, 115 S.Ct. 1555, 1565 n.7, 131 L.Ed.2d 490 (1995) (where previously undisclosed Brady material discloses perjury or its equivalent, test is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"); United States v. Bagley, supra, 473 U.S. at 678-79; United States v. Agurs, 427 U.S. 97, 103 (1976).

As in United States v. Wallach, 935 F.2d 445 (2d Cir. 1991), where the court of appeals ordered a new trial on account of witness perjury, the tainted witness "was essential to the government's case; indeed, he tied all the pieces together. And ... he was the only witness who the jury was led to believe had undergone a radical moral transformation." Id. at

455.[6] Nothing in the opinion below attempts to show that the government has met its weighty burden in this case.[7]

The government argued below that this Court's due process cases did not apply because defense counsel knew that Miller's testimony was false. The court below properly did not rely on this

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[6] In Wallach, as here, the perjurious responses of the witness dealt only with a collateral matter impeaching credibility, which the defense was barred from pursuing by a ruling under Fed.R.Evid. 608(b). There, because the prosecutors had not known of the falsity of the testimony when it was given, the defense had a greater burden to obtain reversal. The same result should have followed here a fortiori.

[7] Ironically, the best evidence of whether the government's toleration of Hernández Miller's perjury was harmless error beyond a reasonable doubt would be found in what reliance, if any, was placed on his credibility in the prosecutor's closing arguments. Particularly important would be the rebuttal, after the witness's credibility had been attacked before the jury by the defense. Yet as discussed under Point 1 of this Petition, there is neither a transcript nor a reconstruction of that critical argument.

contention. Nowhere in the Napue opinion does the Court suggest that the defense attorney's knowledge vel non would matter. While there may have been no Brady error here,[8] the Napue violation is clear and unjustifiable.

In a very similar case, reversing a conviction, the Eighth Circuit rejected the argument that the defense attorney's knowledge of the lie excuses the prosecutor from the duty to correct his witness's perjury. United States v. Foster, 874 F.2d 491 (8th Cir. 1988). In that case, the jury asked during deliberations whether certain witnesses had been granted immunity. In reliance on the prosecutor's false assurance, the trial court responded in the negative. The court of appeals reversed on due process grounds. The court noted that "The fact that defense counsel was also aware of the letters but failed to correct the prosecutor's misrepresentation is of no consequence. This did not relieve the prosecutor of her overriding duty of candor to the court, and to seek justice rather than convictions." Id. at 495.[9]

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[8] See Brady v. Maryland, 373 U.S. 83 (1963).

[9] In United States v. Iverson, 648 F.2d 737 (D.C.Cir. 1981) (per curiam; on denial of rehearing), the Court explained the cases that are at all supportive of

For this reason as well, the Court should grant the writ of certiorari and reverse the judgments of conviction, granting petitioner a new trial.

3. This case presents a suitable vehicle for this Court to clarify when a federal appellate court may properly decline to reverse a conviction, despite the conceded presence of plain error.

This case also presents an important question of federal criminal justice which arises in the wake of this Court's decision in United States v. Olano, 507 U.S. 725 (1993). Despite a proper request from the defense,[10] the trial

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the government's position on this issue as limited to the situation where defense counsel knows of the false testimony and does nothing at trial about it. Here, by contrast, defense counsel did what he could -- confronting the lying witness on cross-examination -- but received no support from the government when his efforts failed to dislodge the witness from his story. In such a situation, "the Giglio-Napue rule strictly applies and due process mandates a new trial." Id. at 739.

[10] As noted by the court below, prior defense counsel's requests to charge in this case contained the name of another

court did not instruct the jury in any way on its duty to draw no adverse inference from petitioner Aponte's election not to testify.

The court below conceded that this was constitutional error, that the error was obvious and therefore "plain," and that it affected Mr. Aponte's substantial rights. Appx. A18-23. Yet the panel declined to reverse, pursuant to Fed.R. App.P. 52(b), on the basis that the error did not "seriously affect the fairness, integrity or public reputation of the judicial proceedings" against Mr. Aponte. See United States v. Olano, supra, 507 U.S. at --, 123 L.Ed.2d at 520-21; United States v. Colón-Pagán, 1 F.3d 80, 82 (1st Cir. 1993) (Breyer, J.). The sole basis for this determination is "the weight of the evidence." Appx. A21; 80 F.3d at 567-68. The panel concluded:

> [W]e are confident in saying that the uncontradicted evidence

_____(cont'd)

of counsel's clients (a female) and had not been adapted for use at petitioner's trial. Appx. A-18 n.9; see CA1 J.A. 122, 143, 144, 156. Nevertheless, the district court accepted as true that these instructions were proposed at trial and directed them to be filed during the April 6, 1995, hearing under Fed.R.App.P. 10(c), so as to correct the record accordingly. Appx. B3-B4.

> against appellant Aponte and Pulliza, from the testimony of several co-conspirators involved in various aspects of the scheme, was overwhelming, and the verdict rendered would have ensued regardless of the error.

Id. at 23; 80 F.3d at 568. The panel engaged in no analysis of the evidence to support this conclusion; the opinion does not even contain the usual summary.

In fact, the testimony against petitioner was not similar to that against any of his co-defendants. Only the uncorroborated word of accomplices avoiding mandatory penalties tended to implicate him. None of the government agents who testified against some of the others mentioned him, and there was no other untainted evidence -- no pictures, no physical evidence, no circumstantial corroboration. See CA1 Gov't Br. 10-15; accord, CA1 Aplt.Br. 8-14. Yet it is easy to imagine a jury asking, "If all these self-interested witnesses are lying, why doesn't Mr. Aponte take the stand and tell us the truth? Isn't 'the Fifth' just a shield for the guilty criminal?" This Court long ago recognized the natural tendency of lay jurors to fail to appreciate the right to remain silent, when it mandated the "no adverse inference" charge. Bruno v. United States, 308 U.S. 287 (1939). Accordingly, the Court held that it is

mandatory in federal cases for the trial court to instruct the jury, upon defense request, on the defendant's unqualified right to refrain from testifying free from "any presumption against him," 18 U.S.C. § 3481,[11] as petitioner's counsel asked to be done in this case. More recently, this Court recognized the essential constitutional nature of the right recognized in Bruno. James v. Kentucky, 466 U.S. 341 (1984); Carter v. Kentucky, 450 U.S. 288 (1981).

Bruno, like the present case, involved a multi-defendant drug conspiracy trial, in which some co-defendants testified but others did not. Justice Frankfurter, for a unanimous Court, concluded that the failure to give the "no adverse inference" instruction, upon request, could not be deemed harmless, at least under those circumstances. 308 U.S. at 293-94. The same rationale applies here and refutes the panel's overly casual application of the limited discretion conferred by Olano.

In both Carter and James, this Court recognized as an open question whether a

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[11] The statute reads: "In trial of all persons charged with commission of offenses against the United States ..., the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Bruno error could be harmless beyond a reasonable doubt. 450 U.S. at 304; 466 U.S. at 351. Here, the panel properly determined (in finding a violation of a "substantial right") that protection against an "adverse inference" from silence is one of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence," Appx. A22 (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991); accord, Olano, supra, 123 L.Ed.2d at 520). To then find that the integrity and public reputation of the process are not affected by tolerating such error in a credibility-based case is inconsistent.

The court below concluded that failure to give the required instruction was a mere "trial-type error." Appx. A22-A23. This is questionable, but even if harmless error analysis applies in a case such as this, the defense here bore its burden of showing that the error could be excused as harmless beyond a reasonable doubt.

There is no basis for assuming that this fundamental error in the jury instructions could have been harmless. Review and reversal of the decision below are necessary to defend the right recognized a half-century ago in Bruno, since declared to be of constitutional dimension, and to preserve the utility of the plain error rule.

For this additional reason, a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner FÉLIX APONTE-VELÁZQUEZ respectfully prays that this Court grant his petition for a writ of certiorari, reverse the judgment below, and remand for a new trial.

Respectfully submitted,
LAW OFFICES OF
ALAN ELLIS, P.C.

By: PETER GOLDBERGER
Attorneys for Petitioner

September 30, 1996.

APPENDIX A

UNITED STATES of America,
Plaintiff, Appellee,
v.
Rodrigo BRAND, Defendant, Appellant.
UNITED STATES of America,
Plaintiff, Appellee,
v.
Felix APONTE-VELAZQUEZ,
Defendant, Appellant.
UNITED STATES of America,
Plaintiff, Appellee,
v.
Carmelo PULLIZA-DELGADO,
Defendant, Appellant.

Nos. 94-1350, 94-1351 and 94-1352.
United States Court of Appeals,
First Circuit.
Heard Jan. 12, 1996.
Decided March 26, 1996.

80 F.3d 560

------- Page 80 F.3d 562 follows -------

Appeals from the United States District Court for the District of Puerto Rico; Hon. Jose Antonio Fuste, U.S. District Judge.

Peter Goldberger with whom James H. Feldman, Jr., Pamela A. Wilk, Alan Ellis and Law Offices of Alan Ellis, P.C. were on brief for appellant Felix Aponte-Velazquez.

Graham A. Castillo Pagan with whom Luis Rafael Rivera was on brief for appellants Rodrigo Brand and Carmelo Pulliza-Delgado.

Luis Rafael Rivera with whom Graham A. Castillo Pagan was on brief for appellants Rodrigo Brand and Carmelo Pulliza-Delgado.

Jose A. Quiles-Espinosa, Senior Litigation Counsel, with whom Guillermo Gil, United States Attorney, Juan A. Pedrosa, Assistant United States Attorney, and Nelson Perez-Sosa, Assistant United States Attorney, were on brief for appellee.

Before SELYA, Circuit Judge, ALDRICH and COFFIN, Senior Circuit Judges.

ALDRICH, Senior Circuit Judge.

Appellants Aponte, Pulliza, and Brand raise several claims of error on appeal of their convictions for various substantive offenses in connection with a cocaine importation and distribution scheme. Finding none meritorious, we affirm.

I. Reconstruction of Trial Record

After persistent efforts by appellate counsel to obtain a complete trial transcript, the trial court determined that certain portions--closing arguments and the court's jury charge--had been

permanently lost. Appellants then moved this court for summary reversal, which we denied without prejudice in an order requesting the court to attempt a recreation adequate for appeal, or, if unable, to determine whether appellants were prejudiced as a result of remaining gaps. The court recreated its jury charge, and located a transcript containing the complete closing argument on behalf of Pulliza and a "substantial portion" of the closing argument for Aponte. It received from Brand's trial attorney some incomplete notes prepared for his closing, along with assurances that it would be impossible to recreate the actual argument. The government filed what the parties agreed is a "reasonable recreation" of its main closing argument, as well as a recreation of its rebuttal, which appellants view as inadequate. All agreed that no contemporaneous objections had been raised during these segments of the trial. The court then certified that the record had been reconstructed as best as the court and the parties could. The defendants have not shown any specific prejudice arising from the absence of the trial transcript other than the inconvenience of not having the precise text ... for purposes of developing argument on appeal on the basis of clear error.[1]

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[1] Appellants concede plain error is their

------- Page 80 F.3d 563 follows -------

Appellants contend adequate appellate review of their convictions is impossible because the court did not produce a reasonable recreation of the missing transcripts,[2] entitling them to reversal and a new trial. They concede that due process does not automatically require reversal when a defendant is denied a full verbatim trial transcript, see, e.g., *Bundy v. Wilson*, 815 F.2d 125, 135 (1st Cir.1987) (an "adequate substitute" may suffice) (citing cases), but contend that non-compliance with the Court Reporter Act, 28 U.S.C. § 753(b)(1), alone requires reversal and a new trial. We disagree.

[1] The Act provides, inter alia, that all open court proceedings in criminal cases "shall be recorded verbatim." 28 U.S.C. § 753(b)(1) (1982). This provision is mandatory, *United States v. Andiarena*, 823 F.2d 673, 676 (1st Cir. 1987), and concededly not complied with in this case, yet nothing prescribes automatic reversal of a defendant's

(cont'd)

sole recourse with respect to the incomplete portions of the transcript.

[2] We limit our consideration to the closing arguments and jury charge, as any other alleged breaches in the record were not brought to the attention of the district court.

convictions for non-compliance, and we are aware of no cases which so hold. Appellants cite *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964), for the proposition that new counsel on appeal[3] cannot properly represent their clients without an "entire transcript." *Id.* at 279-80, 84 S.Ct. at 426-27. *Hardy* held that an indigent federal defendant is entitled to a trial transcript free of charge in order to perfect an appeal; we do not read it to have created a rule mandating reversal for less than a verbatim account.

Alternatively, appellants suggest we follow the Fifth Circuit's view that new counsel on appeal may obtain reversal for lack of a verbatim transcript under § 753(b)(1) merely by showing the missing portion is "substantial and significant," *United States v. Selva*, 559 F.2d 1303, 1306 (5th Cir.1977), and that any reconstruction thereof is less than "substantially verbatim." *United States v. Pace*, 10 F.3d 1106, 1124-25 (5th Cir.1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 2180, 128 L.Ed.2d 899 (1994). True, in *Hardy* the Court observed that the right established by Federal Rule of Criminal Procedure 52(b) to have "plain errors or

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[3] Appellants have all obtained new counsel for this appeal.

defects" noticed by the court "is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended." 375 U.S. at 280, 84 S.Ct. at 427. Yet this was in the context of deciding whether or not appellant should be afforded a transcript *at all*. We do not take this statement to mean that if no *verbatim* transcript is available that an effective appeal is not possible.

[2] The majority of circuits construing § 753(b)(1) have held that to obtain reversal and a new trial, whether or not there is new appellate counsel, defendant must show specific prejudice to his ability to perfect an appeal, beyond mere non-compliance with the act. See *United States v. Gallo*, 763 F.2d 1504, 1530 (6th Cir.1985), *cert. denied*, 474 U.S. 1068, 106 S.Ct. 826, 88 L.Ed.2d 798, and cert. denied, 474 U.S. 1069, 106 S.Ct. 828, 88 L.Ed.2d 800 (1986) (disagreeing with *Selva*); *United States v. Sierra*, 981 F.2d 123, 126-27 (3rd Cir. 1992), *cert. denied*, 508 U.S. 967, 113 S.Ct. 2949, 124 L.Ed.2d 696 (1993) (same); *United States v. Antoine*, 906 F.2d 1379, 1381 (9th Cir.), *cert. denied*, 498 U.S. 963, 111 S.Ct. 398, 112 L.Ed.2d 407 (1990) (same). But see *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1212 (11th Cir.1993) (as successor court to former Fifth Circuit, bound by *Selva*). We have indicated preference for the

majority view, see *Sabatier v. Dabrowski*, 586 F.2d 866, 869 (1st Cir.1978) (holding that if § 753(b)(1) applied to extradition proceedings, reversal on account of non-compliance would require showing specific prejudice), and explicitly adopt it today.

[3] Appellants conceded to the trial court that the government's reconstruction of its main closing argument is substantially accurate. This should enable effective review for plain error, yet appellants make no particularized claim that such error occurred. Nor do they make any claim that plain error could have occurred during the closing arguments of one of their own attorneys. With respect to the government's rebuttal, we are

------- Page 80 F.3d 564 follows -------

hard-pressed to conceive what sort of illegitimate argument could have been made during these few moments that might have "so poisoned the well that the trial's outcome was likely affected," *Arrieta-Agressot v. United States*, 3 F.3d 525, 528 (1st Cir.1993) (quoting *United States v. Mejia-Lozano*, 829 F.2d 268, 274 (1st Cir.1987)), nor do appellants suggest any based on the reconstruction that was submitted. In any event, given the quantity and strength of the evidence against all three appellants from the testimony of several co-conspirators-- eye-witnesses to their involvement in the

various preparations, possessions and transactions amounting to the offenses charged--we are not persuaded that any deficiency could have risen to a miscarriage of justice; i.e., even if the rebuttal was tainted by some imaginable error, we would not find "a substantial chance that absent the error the jury would have acquitted." *Id.* We therefore uphold the district court's conclusion that appellants' ability to perfect an appeal was not prejudiced, and turn now to the merits of their claims.

II. Motion for Continuance

On the morning of trial the defense made a final request for continuance based on the last minute decision of Jorge Hernandez Miller, the lead co-conspirator, to plead guilty and become the government's chief witness. Remaining defendants argued this necessitated more time to adjust trial strategy and gather information to impeach him. After thorough exploration, the court, though sympathetic, saw no justification for delay:

> [Y]ou had the opportunity to interview him ... as you told me in chambers that this has been done and now that all the Jencks Act [material] has been turned over ... the latest bits of information that

were generated like the interviews [of the witness] with the agents ... are going to be turned over to you including rough notes, ... I will not continue this case.

[4][5][6] A trial court has wide discretion to grant or deny a request for continuance. *United States v. Saccoccia*, 58 F.3d 754, 770 (1st Cir.1995). "Only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel," and would amount to an abuse of that discretion. *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616-17, 75 L.Ed.2d 610 (1983) (internal quotations omitted). We assess appellants' special reasons, plus relevant factors such as the amount of time needed for effective preparation and the amount actually available, diligence in preparing for trial and whether the defense contributed to its perceived predicament, the likely utility of a continuance, inconvenience to the court, opposing party, and witnesses, and any unfair prejudice caused by the denial. *Saccoccia*, 58 F.3d at 770 (citations omitted).

Appellants allege the court failed to address "special circumstances of an emergent nature beyond their control." They claim that after Miller's change of plea they suddenly faced an unexpected need to gather impeachment material and

to do additional preparation, as they had divided responsibilities among themselves due to the considerable volume of trial material involved,[4] and Miller's defection overburdened the remaining defendants. They contend they "could not have been more diligent," would have found valuable impeachment material if granted additional time, and were prejudiced in cross-examining Miller because of the denial; inconvenience to others, by comparison, was minimal.

[7] Appellants' accusations against the court are unfounded. As the court pointed out, the defense had had ample time and substantial assistance from the court to prepare for trial, and although more might have helped, that is always true. Defense counsel could have anticipated that a division of labor strategy might leave them in a bind if one dropped out, especially since the original indictment included some 31 co-defendants who had been pleading out on a regular basis up to and even during trial. The court was very careful to elicit from counsel precisely

------- Page 80 F.3d 565 follows -------

what more they thought they needed and hoped to find to impeach Miller, and why.

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[4] Aponte points out that discovery involved "some 1453 documents totaling over 5000 pages."

It gave a thoroughly reasoned response, observing that the defense had been given unlimited access to the witness for four days prior to the start of trial and at least several more afterward until he took the stand, a "dream for a defense attorney," as well as notes government agents had taken during their interviews of the witness. There was no abuse of discretion in ruling this was sufficient.

We add only that we do not see, even with hindsight, what more a continuance would have achieved. The defense had apparently hoped to discredit Miller by implicating him in the uncharged murders of several accomplices in the cocaine conspiracy, and wished more time to locate, interview and subpoena witnesses who could tie Miller to these crimes. The court, however, in a pre-trial ruling, had strictly prohibited introduction of extrinsic evidence of Miller's involvement in the murders and limited cross-examination in reference to these crimes strictly to questioning his motivation to enter the plea agreement,[5] in accordance with Federal Rule of Evidence 608(b).[6] See *Tigges v. Cataldo*, 611 F.2d

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[5] This ruling has not been appealed.

[6] (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the

936, 938 (1st Cir.1979). As to this, *post*.

III. Prosecutorial Misconduct

Before trial government counsel had informed the defense and the court that Miller had stated during plea negotiations that he had decided to plead guilty because "he thought that he was going to be imputed with some murders to which he denies, and ... the reason that motivated him is because he wanted to clear the record that in fact he did not participate in those murders." During a pretrial interview Miller had told defense counsel roughly the same--that he was afraid "the government ... [was] going to bring a massacre against him, a murder against him, but he also stated to us that in fact he did not do that." The plea agreement was admitted in evidence. It made no mention, of course, of murders.

During cross-examination defense counsel sought vigorously to impeach Miller's testimony linking their clients to the drug venture by attempting to solicit an admission from Miller that he

_____(cont'd)

> witness' credibility, other than conviction of crime ... may not be proved by extrinsic evidence.

Fed.R.Evid. 608(b).

was motivated to cooperate with the government by a desire to "minimize the severity of the accusations against himself," specifically by avoiding being implicated in, or charged with, the murders. Miller repeatedly denied such motivation, professing only a desire to "repent" and "tell the truth."

Appellants now contend this was an outright lie that due process required the government to correct.[7] They rely principally upon *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), which held that a defendant's due process rights under the Fourteenth Amendment required reversal of his conviction where the prosecutor failed to correct a witness' denial of receiving promises of leniency in exchange for his testimony, knowing it was false, even though the prosecutor had not himself solicited the falsity. 360 U.S. at 269, 79 S.Ct. at 1177. The Court said this principle, "implicit in any concept of

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[7] Defense counsel made no indication to the court at the time that the defense believed the government was under an obligation to clarify Miller's statements about his motivation to plead, and, indeed, indicated satisfaction with coverage of the issue when the court inquired prior to allowing examination of Miller to proceed into another area.

ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." Id. Nor did the fact that the jury was presented with other grounds for questioning the witness' credibility "turn[ ] what was otherwise a tainted trial into a fair one." Id. at 270, 79 S.Ct. at 1177. Appellants contend defense counsels' equal knowledge of Miller's pre-trial admissions cannot alleviate the government of its duty in this case to bring this impeachment "evidence" before the jury.

[8] There are two answers to this. The first is that the court had already ruled that

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testimony of murders was too prejudicial to be admitted. But, more important, although defendant refused this specific characterization of his motives, he did concede to believing the plea agreement meant that "if I speak about things of which I have knowledge or in which I have taken part, I wouldn't be indicted for them," and "would be sentenced to fewer years." This was a sufficient acknowledgment that his claim of rebirth was less than genuine; there could be no question the government had no duty to go further.

IV. Jury Instructions

Having raised no objections to any aspect of the jury instructions at trial,

Aponte now claims plain error both in the court's explanation of reasonable doubt and in its failure to give a requested instruction on the defendant's exercise of his right to remain silent. The following instructions (emphasis ours) contain the alleged errors:

> A reasonable doubt is a doubt based upon reason and common sense, and may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.
>
> *If* after a careful and impartial consideration with your fellow jurors of all the evidence, *you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty.* On the other hand, *if* after a careful and impartial consideration with your fellow jurors of all the evidence, *you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.*
>
> ... Each defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence. *The government has the burden of proving every*

element of the charge beyond a reasonable doubt. If it fails to do so, you must return a not-guilty verdict.

A.

Aponte contends that by the first paragraph the court permitted the jury to convict by a degree of proof lower than constitutionally required. He argues that "firmly convinced" suggests a burden of proof akin to the civil "clear and convincing" standard, use of which is impermissible in a criminal case. See *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1808-09, 60 L.Ed.2d 323 (1979) (clear and convincing is an "intermediate standard" between preponderance of the evidence and proof beyond a reasonable doubt); *In re Winship, 397 U.S.* 358, 363-64, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970) (guilt in a criminal case must be proved by no less a standard than "beyond a reasonable doubt"). According to Aponte, it is linguistically impossible to conceive how "firmly convinced" could equate with "beyond a reasonable doubt," when "clear and convincing" does not.

[9] Assessing the instructions as a whole, *Victor v. Nebraska*, --- U.S. ----, ----, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994), we conclude that the emphasized portions adequately and

ultimately conveyed an accurate, unambiguous and comprehensible description of the government's burden and the standard for acquittal. Whether or not the "firmly convinced" definition alone would be constitutionally sufficient to convey the meaning of proof beyond a reasonable doubt, the court's further exposition here left no doubt that the jury's duty was to convict only upon reaching consensus as to guilt beyond a reasonable doubt.[8] Nothing further is required. *United States v. Andujar*, 49

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[8] The "firmly convinced" language has withstood similar attack in a variety of contexts. See *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir.1992), *cert. denied*, 508 U.S. 979, 113 S.Ct. 2979, 125 L.Ed.2d 677 (1993) (upholding same pattern instruction used here); *United States v. Hunt*, 794 F.2d 1095, 1100-1101 (5th Cir.1986) ("firmly convinced" adequately conveys "beyond a reasonable doubt" standard); *United States v. Taylor*, 997 F.2d 1551, 1557 (D.C.Cir.1993) (same); see also *United States v. Williams*, 20 F.3d 125, 131 (5th Cir.), *cert. denied*, --- U.S. ----, 115 S.Ct. 239, 130 L.Ed.2d 162 (1994); *United States v. Barrera-Gonzales*, 952 F.2d 1269, 1272-73 (10th Cir.1992); *United States v. Conway*, 73 F.3d 975, 980 (10th Cir.1995).

F.3d 16, 23 (1st Cir.1995).
------- Page 80 F.3d 567 follows -------

B.

As was his right, Aponte elected not to testify, and requested the following instruction be given to the jury:

> Under the law, a defendants [sic] does not need to testify, since it is the Government who must prove her [sic][9] guilty beyond a reasonable doubt. No presumption or inference of guilt may be made or drawn.

The court declined, instructing instead as quoted above. While he did not object, Aponte now claims violation of his constitutional rights.

[10][11] The Fifth Amendment guarantees a criminal defendant both the right to remain silent and that no adverse

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[9] The district court apparently accepted from Aponte's appellate counsel a set of proposed jury instructions that counsel believed had been submitted to the court but were inexplicably absent from the record. We note that these instructions were not prepared for Aponte, but for a Sonia Berrios Rodriguez, but since the government did not object to their inclusion in the appellate record as Aponte's requested instructions, we will treat them as such.

inferences may be drawn from his exercise of this right. *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S.Ct. 1112, 1121-22, 67 L.Ed.2d 241 (1981). Further, "when the defendant makes a timely request that a prophylactic instruction be given ... [the court] has the constitutional obligation ... to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Id.*[10] We have not read Carter to require use of the exact wording requested, however, so long as the trial court's instructions complied with this obligation. *United States v. Ladd*, 877 F.2d 1083, 1089 (1st Cir.1989).

[12][13] Our question is whether instructing that the government has the burden of proof and that defendant does not have to testify or present evidence adequately communicates that no adverse inferences may be drawn from the fact that he does not testify. The government urges that we answered this affirmatively in Ladd, where we approved an instruction that the defendant's silence "cannot even be considered by you in arriving at your verdict." *Id.* Not so. A jury might

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[10] This obligation is also imposed by statute. 18 U.S.C. § 3481 (formerly designated as 28 U.S.C. § 632). See *Bruno v. United States*, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939).

well think that a defendant's right not to testify means merely that he cannot be called as a witness, leaving it to draw such conclusions from his silence as it felt warranted. An instruction not to consider his failure to testify precisely forbids drawing inferences. *Ladd*, 877 F.2d at 1089. Here, however, the court mentioned nothing beyond the defendant's right not to testify or present evidence. *Carter v. Kentucky* makes clear that, once request for a no-adverse-presumption instruction has been made, the "full and free exercise" of the constitutionally guaranteed privilege against self-incrimination requires more than instruction on the right not to testify and to be presumed innocent until proven guilty. 450 U.S. at 305, 101 S.Ct. at 1121-22. See also *United States v. Eiland*, 741 F.2d 738, 743 (5th Cir.1984) (holding instructions similar to those given here constitutionally deficient under *Carter*).

We also find, per *United States v. Olano*, 507 U.S. 725, 736-37, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993), that the forfeited error was "plain," and "affect[ed] substantial rights" within the meaning of Fed.R.Crim.P. 52(b). See *Bruno v. United States*, 308 U.S. 287, 293-94, 60 S.Ct. 198, 200-01, 84 L.Ed. 257 (1939) (failure to give requested instruction cautioning against drawing presumptions from defendant's failure to testify was not a mere "technical erro[r]

... which do[es] not affect ... substantial rights....'). We therefore perceive discretion to reverse, but no obligation to do so. Fed.R.Crim.P. 52(b); *Olano*, 507 U.S. at 734-36, 113 S.Ct. at 1778. See also *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827-28, 17 L.Ed.2d 705 (1967) (not every constitutional error automatically requires reversal).

[14][15] *Olano* contemplates that we guide our discretion under Rule 52(b) by further determining whether the error "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings." 507 U.S. at 736, 113 S.Ct. at 1779 (internal quotations omitted). We have long realized that among the things we may consider is the

------- **Page 80 F.3d 568 follows** -------

weight of the evidence of guilt or innocence, without casting it favorably to the government or presuming that credibility issues were resolved in its favor, *Arrieta-Agressot*, 3 F.3d at 528, to determine whether the error could have made any difference to the verdict.[11] We

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[11] At this stage of review for forfeited error the assessment is whether the error was "harmless beyond a reasonable doubt," and differs from so-called "harmless error" review only in that the defendant bears the burden of persuasion. Olano, 507 U.S. at 734-36, 113 S.Ct. at 1778.

do not view Olano as having removed or limited such an assessment from our discretionary consideration as a general matter. However, the Court has deemed a small number of "structural defects" not amenable to "quantitative[ ] assess-[ment]," *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991), including total deprivation of the right to counsel at trial (*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)), and lack of an impartial judge (*Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)). *Id.* at 309, 111 S.Ct. at 1264-65. See also *id.* at 310, 111 S.Ct. at 1265 (citing additional cases); *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993) (constitutionally deficient reasonable doubt instruction). The distinction these special errors share is that they are "structural defects in the trial mechanism" which affect "the entire conduct of the trial from beginning to end" and "without [which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence," rather than being simply "error[s] in the trial process itself." *Fulminante*, 499 U.S. at 309-10, 111 S.Ct. at 1265 (internal quotations omitted). We think failure to give a requested *Carter* instruction falls comfortably in the latter category. It is not the sort

of error for which an assessment of the evidence is unsuitable precisely because it concerns the evidentiary value the jury may give to a defendant's election not to testify on his own behalf. *Carter*, 450 U.S. at 305, 101 S.Ct. at 1121-22. On this basis we are confident in saying that the uncontradicted evidence against appellants Aponte and Pulliza, from the testimony of several co-conspirators involved in various aspects of the scheme, was overwhelming, and the verdict rendered would have ensued regardless of the error. In sum, although "the failure to limit the jurors' speculation on the meaning of [the defendant's] silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of [defendant's Fifth Amendment privileges]," *id.*, we do not believe it could have seriously affected the fairness of the proceedings.

V. Double Jeopardy

Aponte maintains that because the same offenses underlying his convictions also formed the basis of a civil forfeiture of some personal assets, pursuant to the Controlled Substances and Money Laundering Acts, 21 U.S.C. §§ 881(a)(6) and (7) and 18 U.S.C. § 981, respectively, his criminal sentence constitutes a

prohibited second punishment, for the same offenses, in violation of the Double Jeopardy Clause of the Fifth Amendment. See, e.g., *United States v. Dixon*, 509 U.S. 688, ----, 113 S.Ct. 2849, 2855-56, 125 L.Ed.2d 556 (1993).

[16][17] The Clause only becomes relevant, however, once a defendant has first been placed in jeopardy, and "even then, it is only the second proceeding that is constitutionally endangered." *United States v. Pierce*, 60 F.3d 886, 889 (1st Cir.1995), *pet. for cert. filed*, Oct. 19, 1995 (No. 95-6474). Aponte contends, against all authority, that jeopardy in the criminal case did not attach until his sentencing, well *after* imposition of the civil penalty.[12] We regard it as beyond question that "jeopardy attaches when the jury is empaneled and sworn." *Crist v. Bretz*, 437 U.S. 28, 35, 98 S.Ct. 2156, 2161, 57 L.Ed.2d 24 (1978). *Pierce*, 60 F.3d at 889. A glance at the sequence of events

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[12] The following chronology is pertinent:

Jury empaneled:	September 21, 1993
Criminal trial began:	Sept. 22, 1993
Verdicts read:	October 1, 1993
Civil action commenced:	Nov. 4, 1993
Forfeiture stipulated:	March 9, 1994
Forfeiture order:	March 10, 1994
Criminal sentencing:	March 21, 1994

in this case, *supra* note 12, reveals that the criminal

------- Page 80 F.3d 569. follows -------

sanction therefore cannot have been second to the forfeiture, and thus whether or not civil sanctions under 21 U.S.C. §§ 881(a)(6) and (7) and 18 U.S.C. § 981 even constitute punishment for the purposes of the Double Jeopardy Clause is a question we need not reach.

The convictions of appellants are therefore *affirmed*.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,*
Plaintiff, * Criminal No.
v. * 93-070 (JAF)
WALTER CARABALLO CRUZ;*
RODRIGO BRAND-GARCIA; * THIS ORDER
CARMELO PULLIZA; * RELATES TO
FELIX APONTE-VELAZQUEZ, and* APPEALS 93-
JORGE PARADA MUÑOZ, * 2380 (WALTER
Defendants. * CARABALLO-CRUZ);
94-1350 (RODRIGO BRAND);
94-1351 (FELIX APONTE-
VELAZQUEZ); 94-1352
(CARMELO PULLIZA); AND
94-1353 (JORGE PARADA-
MUÑOZ).*
----------*

O R D E R

Further to our order of March 14, 1995, Docket Document No. 805, and the Order of Court entered by the U.S. Court of Appeals for the First Circuit on February 7, 1995, in Appeals 93-2380 and 94-1350 to 1353, this court certifies as follows:

1. A hearing was held on April 6, 1995, to dilucidate [sic] the attempts made to re-create closing arguments in order to aid in appellate review.

2. In addition, the court considered the completeness of the reconstruction and the specific showing of prejudice arising from the absence of a transcript of the closing arguments by the government and codefendant Brand.

3. The court also considered whether there were any objections to the jury charge delivered at the close of trial, on the basis of the recent reconstruction made by this Court. See Docket Document No. 809.

On the basis of what transpired at the hearing, the court finds as follows:

4. The best approximation of the jury charge is contained in the reconstruction made by the court. See document entitled "Recreation of Jury Charge," filed by the court on March 16, 1995, Docket Document No. 809. At the time that the court instructed the jury in this case, no objection was raised or preserved for the record by any of the defense attorneys who participated in the trial.

5. Attorney Edwin Quiñones, trial counsel for Rodrigo Brand, has filed notes prepared and used by him for closing argument purposes in this case. Two pages from said notes are missing. On April 12 1994, attorney Quiñones' file on Rodrigo Brand was turned over to Martha L. Brand, the defendant's wife. Mr. Quiñones did not keep a copy of the file documents. Mr. Quiñones has assured

the court that it is impossible for him to re-create his closing argument based on his recollection of the case and on the basis of the limited materials in his possession. Mr. Quiñones has assured the court that even if he had access to the file, it would be difficult for him to recreate his closing argument. Mr. Quiñones confirmed that at the time of trial, no objection to the government's closing argument or to the court's jury charge was lodged.

6. Former Assistant U.S. Attorney Carlos A. Pérez has submitted his rebuttal arguments on behalf of the government at the close of trial. His re-creation of the closing arguments appears filed as Docket Document No. 813. Counsel for the various defendants suggested to the court that the re-creation made by Mr. Pérez is not in his usual style. After reading Mr. Pérez's statement, we can only surmise that the same is nothing else but his effort to reduce to writing what he remembers were the areas of argument raised by him during the rebuttal turn.

7. Codefendant Félix Aponte-Velázquez' counsel pointed out to the court the fact that Mr. Félix Aponte-Velázquez requested specific jury instructions. See Docket Document No. 428. Said document only contains a cover motion and no proposed charge. At the hearing held today, the court received

from attorney Goldberger a photocopy of what he believes was intended to be part of Docket Document No. 428. The document is entitled "Félix A. Aponte-Velázquez Requested Jury Instructions." The document is appended to this order so that the court of appeals can make reference to it as part of Docket Document No. 428.

8. The government has filed a re-creation of the government's main closing argument. This was prepared by former Assistant U.S. Attorney Hernán Ríos, who was in charge of delivering the closing argument before the jury. See Docket Document No. 816. The parties have read Mr. Ríos' submission and find it to be a reasonable recreation under the circumstances.

9. At the conclusion of the April 6, 1995, hearing, the court invited counsel to chambers, where the original record on appeal was reviewed. At the request of counsel for the defendants, the court photocopied several docket documents, including verdict forms and minutes of proceedings, starting at Docket Document No. 485. The photocopies were turned over to counsel immediately.

10. This court certifies that the record of the closing arguments and jury charge has been reconstructed under the circumstances of the missing transcript, as best as the court and the parties could. The defendants have not shown any

specific prejudice arising form the absence of the trial transcript other than the inconvenience of not having the precise text of the jury charge, the government's closing argument, and codefendant Brand's closing argument for purposes of developing argument on appeal on the basis of clear error. The parties are in agreement that no contemporaneous objection was raised during the closing arguments or during the jury charge.

11. The documents referred to in this order form part of Volumes VII, VIII, and XI of the district court file. These volumes, along with all the remaining volumes of this record, will be forwarded to the Clerk, U.S. Court of Appeals, First Circuit, to serve as the record and supplemental record on appeal. The district court appeals' clerk will index volume XI to include the most recent filings, starting with Docket Document No. 808.

IT IS SO ORDERED.

San Juan, Puerto Rico, this _7th_ day of April, 1995.

s/ J A Fusté
JOSE ANTONIO FUSTE
U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

No. 94-1350

UNITED STATES,
Appellee,
v.
RODRIGO BRAND,
Defendant, Appellant.

No. 94-1351

UNITED STATES,
Appellee,
v.
FELIX APONTE-VELAZQUEZ,
Defendant, Appellant.

No. 94-1352

UNITED STATES,
Appellee,
v.
CARMELO PULLIZA DELGADO,
Defendant, Appellant.

Before

TORRUELLA, Chief Judge,
ALDRICH and COFFIN, Senior Circuit Judges,
SELYA, CYR, BOUDIN, STAHL and LYNCH,
Circuit Judges.

ORDER OF COURT
Entered: May 2, 1996

The panel of judges that rendered the decision in these cases, having voted to deny the petitions for rehearing and,

the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
WILLIAM H. NG, Clerk.

By s/Janice M. O'Neil
Chief Deputy Clerk.

[cc: Messrs. [& Ms.] Rafael Rivera, Wilk, Goldberg[er], Castillo Pagan, Perez-Sosa, Quiles Espinosa and Perez]

Supreme Court, U.S.
FILED
DEC 4 1996

(3)

No. 96-532

In the Supreme Court of the United States

OCTOBER TERM, 1996

FELIX APONTE-VELAZQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
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JOHN C. KEENEY
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20 pp

QUESTIONS PRESENTED

1. Whether the lack of a verbatim transcript of the prosecution's rebuttal closing argument requires reversal of petitioner's conviction.

2. Whether the Due Process Clause required the prosecution to correct the allegedly false testimony of one of its witnesses when the prosecution neither elicited nor relied upon the testimony, and defense counsel was aware of the inconsistency and exposed it during cross-examination.

3. Whether the district court's failure to instruct the jury to draw no adverse inferences from petitioner's failure to testify required reversal under the plain error rule.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-532

FELIX APONTE-VELAZQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 80 F.3d 560.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1996. A petition for rehearing was denied on May 2, 1996. Pet. App. C1-C2. On July 23, 1996, Justice Souter granted petitioner's application for an extension of time within which to file a petition for a writ of certiorari to and including September 30, 1996, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; conspiring to import cocaine, in violation of 21 U.S.C. 963; and importing cocaine, in violation of 21 U.S.C. 952.[1] The district court sentenced petitioner to a term of 188 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A25; Gov't C.A. Br. 4-5, 6.

1. In September 1991, FBI Agent Carlos Osorio arrived in Puerto Rico with a confidential informant. Manuel Aponte and Carmelo Pulliza met Osorio and the informant at the airport. They took Osorio to Manuel Aponte's apartment, where Jorge Hernandez Miller and Wilfredo Caicedo were planning the drug importation operation. Gov't C.A. Br. 10-12, 14. Later that month, petitioner, Pulliza, Caicedo, and Miller met at petitioner's home to plan the offloading of 596 kilograms of cocaine. Petitioner arranged for fishermen to recover the drugs from the sea. After the drugs were delivered to the stash house, they were taken to petitioner's home and, later, moved to San Juan. Petitioner was paid with 45 kilograms of cocaine for himself and the fishermen. *Id.* at 11-14.

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[1] Petitioner and 30 other defendants were charged with various drug offenses in a 48-count superseding indictment. Petitioner was tried with two co-defendants, Carmelo Pulliza and Rodrigo Brand. Co-defendants Manuel Aponte, Wilfredo Caicedo, and Jorge Hernandez Miller pleaded guilty and testified for the government at the trial. Both Pulliza and Brand were convicted of drug offenses with petitioner. Gov't C.A. Br. 2, 5-7, 11-12, 14.

On September 27, 1991, Manuel Aponte and Pulliza flew from San Juan to Miami with some of the cocaine in their suitcases. Caicedo took delivery of the cocaine, and the couriers returned to Puerto Rico. The next day, Manuel Aponte and Roberto Montanez transported additional suitcases of cocaine to Miami. Gov't C.A. Br. 12. Agent Osorio identified Manuel as he delivered the drugs to Caicedo, and both Manuel and Caicedo were arrested. *Id.* at 11, 13. Manuel and Caicedo became cooperating defendants and both provided information implicating petitioner in the drug importation scheme. *Id.* at 11-13.

2. a. At trial, co-defendant Jorge Hernandez Miller testified about petitioner's role in the drug offenses. Gov't C.A. Br. 14. Before trial, the government had informed the defense and the district court that Miller had stated during plea negotiations that he was pleading guilty because he believed that he was gong to be implicated in murders, "and * * * he wanted to clear the record that in fact he did not participate in those murders." Pet. App. A12. In a pre-trial interview, Miller also told defense counsel that he was afraid "the government . . . [was] going to bring a massacre against him, a murder against him," but that he had not committed murder. *Ibid.*[2]

During the trial, Miller's plea agreement was admitted into evidence. It did not mention murders.

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[2] The defense had received four days of unlimited access to Miller before trial and several more days after trial began, and were given notes taken by government agents during the government's interviews. Pet. App. A11. In a pre-trial ruling, the court strictly prohibited the defendants from introducing extrinsic evidence about the alleged murders and limited cross-examination on those alleged crimes to challenging Miller's motivation for entering the plea agreement. *Ibid.*

Pet. App. A12. On cross-examination, defense counsel tried to elicit an admission from Miller that he cooperated with the government to "minimize the severity of the accusations against himself" and, in particular, to avoid being implicated in, or charged with, the murders. Miller repeatedly denied such a motive, professing only a desire to "repent" and "tell the truth." *Id.* at A12-A13. Miller conceded, however, that under the plea agreement, "if I speak about things of which I have knowledge or in which I have taken part, I wouldn't be indicted for them," and "would be sentenced to fewer years." *Id.* at A14.

b. Petitioner did not testify at his trial. He requested that the jury be instructed that:

> Under the law, a defendants [sic] does not need to testify, since it is the Government who must prove her [sic] guilty beyond a reasonable doubt. No presumption or inference of guilt may be made or drawn.

Pet. App. A18. The district court declined to give petitioner's proposed instruction, and instead advised the jury that:

> Each defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence. *The government has the burden of proving every element of the charge beyond a reasonable doubt. If it fails to do so, you must return a not-guilty verdict.*

Id. at A15-A16. Petitioner did not object to that instruction, or to the denial of his requested instruction. *Id.* at A14-A15, A18.

3. Following petitioner's sentencing, new counsel entered the case to represent him on appeal. After

counsel sought unsuccessfully to obtain a complete trial transcript, the district court determined that certain portions of the transcript—the closing arguments and the court's jury charge—had been irretrievably lost. Pet. App. A2-A4 & n.2. Petitioner and his co-defendants moved in the court of appeals for summary reversal. The court of appeals denied the motion without prejudice, but ordered the district court to attempt to recreate an adequate record for appeal or, if it was unable to do so, to determine whether petitioner and his co-defendants would be prejudiced by the remaining omissions from the record. *Id.* at A3.

The district court reconstructed its jury charge and located a transcript of co-defendant Pulliza's entire closing argument and a "substantial portion" of petitioner's closing. Trial counsel for co-defendant Brand supplied the court with partial notes prepared for his closing argument, and assured the court that it would be impossible to recreate the actual closing argument. The government filed what the parties agreed was a "reasonable recreation" of its principal closing argument, and a reconstruction of its rebuttal argument, which petitioner and his co-defendants viewed as inadequate. Pet. App. A3, B2-B4. All parties agreed that no contemporaneous objections had been raised during the segments of the trial for which the transcript was incomplete. *Id.* at A3. The district court certified that the record had been reconstructed

> as best the court and the parties could. The defendants have not shown any specific prejudice arising from the absence of the trial transcript other than the inconvenience of not having the precise

> text . . . for purposes of developing argument on appeal on the basis of clear error.

Ibid.; *id.* at B4-B5.

4. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A25. The court ruled that, although the absence of a complete trial transcript violated the Court Reporter Act, 28 U.S.C. 753(b), the Act does not require a new trial in the absence of "specific prejudice" to the defendant's ability to perfect an appeal. Pet. App. A6-A7. The court of appeals ruled that no "specific prejudice" had been demonstrated in this case. Petitioner conceded that the government's reconstruction of its main closing argument was "substantially accurate" and that no plain error occurred during the defendants' closings. With respect to the government's rebuttal argument, the court was "hard-pressed to conceive what sort of illegitimate argument could have been made during these few moments" that would have impermissibly prejudiced petitioner, especially where petitioner and the other defendants could recall no such error based on the government's reconstruction. *Id.* at A7. Furthermore, in light of the quantity and strength of the evidence against petitioner, the court of appeals was "not persuaded that any deficiency [in the government's rebuttal] could have risen to a miscarriage of justice." *Id.* at A7-A8.

The court of appeals also ruled (Pet. App. A12-A14) that the government was not required to correct Miller's denial that his testimony was motivated by a desire to avoid being implicated in, or charged with, certain murders. The district court had already excluded testimony about the murders as unduly prejudicial and, in any event, Miller had conceded

during cross-examination that his testimony was motivated in part by a desire to avoid indictment and to obtain a more lenient sentence. That testimony constituted a "sufficient acknowledgement that [Miller's] claim of rebirth was less than genuine" to relieve the government of any duty to go further. *Id.* at A14.

Finally, the court of appeals rejected (Pet. App. A18-A23) petitioner's claim that the district court's failure to instruct the jury that it could draw no adverse inference from petitioner's exercise of his right to remain silent was plain error that required reversal under Fed. R. Crim. P. 52(b). Because the uncontradicted evidence against petitioner was overwhelming, the court concluded that the instructional error did not "seriously affect[] the fairness of the proceedings." Pet. App. A23.[3]

ARGUMENT

1. Petitioner contends (Pet. 11-14) that his conviction must be reversed because of the absence of a transcription of the prosecution's rebuttal argument, and that the court of appeals' contrary decision conflicts with the rulings of other courts of appeals. Because petitioner's claim would fail under the standard applied by any court of appeals, this Court's

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[3] Petitioner also argued that the district court erred in denying a continuance and formulating its instruction on reasonable doubt, and that the prosecution violated the Double Jeopardy Clause. The court of appeals rejected each of those arguments, and petitioner does not renew them here. Pet. App. A8-A12, A14-A18, A23-A25.

review is not warranted.[4]

The courts of appeals are in agreement, and petitioner does not contend otherwise, that the failure of a court reporter to record all trial proceedings verbatim does not require automatic reversal of a conviction. See *United States* v. *Pace*, 10 F.3d 1106, 1124 (5th Cir. 1993), cert. denied, 114 S. Ct. 2180 (1994); *United States* v. *Preciado-Cordobas*, 981 F.2d 1206, 1212 (11th Cir. 1993); *United States* v. *Sierra*, 981 F.2d 123, 125 (3d Cir. 1992), cert. denied, 508 U.S. 967 (1993); *United States* v. *Antoine*, 906 F.2d 1379, 1381 (9th Cir.), cert. denied, 498 U.S. 963 (1990); *United States* v. *Gillis*, 773 F.2d 549, 554 (4th Cir. 1985); *United States* v. *Gallo*, 763 F.2d 1504, 1530 (1985), amended, 774 F.2d 106 (6th Cir. 1985), cert. denied, 474 U.S. 1068 and 1069, 475 U.S. 1017 (1986).

The majority of courts, including the court of appeals here, require the defendant to demonstrate "specific prejudice" to the defendant's ability to perfect an appeal. See *Antoine*, 906 F.2d at 1381; *Gillis*, 773 F.2d at 554; *Gallo*, 763 F.2d at 1530-1531; see also *Sierra*, 981 F.2d at 125. The Fifth and Eleventh Circuits also generally require a showing of specific prejudice. *Preciado-Cordobas*, 981 F.2d at 1212-1213; *Commercial Credit Equipment Corp.* v. *L & A Contracting Co.*, 549 F.2d 979, 980 (5th Cir. 1977). When the defendant is represented by new counsel on

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[4] Section 753(b) of Title 28, provides, in relevant part:

> Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method * * *. Proceedings to be recorded include (1) all proceedings in criminal cases had in open court.

appeal, however, the Fifth and Eleventh Circuits will reverse if the omission is "substantial and significant." *Preciado-Cordobas*, 981 F.2d at 1212; *United States* v. *Selva*, 559 F.2d 1303, 1306 (5th Cir. 1977).[5]

These different articulations of the governing standard do not warrant further review of this case because petitioner cannot prevail under either standard. The only relevant portion of the transcript that is missing is the prosecution's rebuttal argument.[6] The government submitted the prosecutor's attempted recreation of his rebuttal argument. Although petitioner objects that the reconstruction is inadequate,

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[5] The difference between the tests may be more semantic than substantive. At least two of the courts that apply the "specific prejudice" test nevertheless consider the presence of new counsel on appeal to be a "significant factor" in assessing prejudice. See *Sierra*, 981 F.2d at 126; *Antoine*, 906 F.2d at 1381.

[6] Although petitioner also notes that the other closing arguments and the jury charge were omitted, petitioner concedes that those portions have been "adequately reconstructed." Pet. 13 n.5; see also Pet. App. A7. Where the record has been reconstructed through competent substitute materials, a new trial is unnecessary. *Mayer* v. *City of Chicago*, 404 U.S. 189, 194 (1971) (State must afford indigent defendants only a "record of sufficient completeness to permit proper consideration of his claims" on appeal); *Norvell* v. *Illinois*, 373 U.S. 420, 424 (1963) (when through no fault of the prosecution, a transcript is unavailable, "some practical accommodation must be made"); *Draper* v. *Washington*, 372 U.S. 487, 495-496 (1963); *United States* v. *Cashwell*, 950 F.2d 699, 703-704 (11th Cir. 1992). Petitioner also contends that the testimony of certain trial witnesses was omitted. That claim, however, was not brought to the attention of the district court or the court of appeals. Pet. App. A4 n.2, A7. In any event, petitioner concedes that this testimony "does not seem to have been critical." Pet. 13 n.5.

he concedes that none of the three defendants, himself included, objected to any aspect of the rebuttal argument, and he identifies no particular aspect of the reconstructed rebuttal that triggers concern. Instead, petitioner seeks automatic reversal based solely on the court reporter's failure to transcribe rebuttal closing argument and the speculation that plain error might have occurred. That argument fails to satisfy the "substantial and significant" test:

> Mere speculation, entirely unsupported or contradicted by the record, that error may have been committed during an unrecorded part of the trial simply is not enough to support a finding that omissions are substantial and significant.

Preciado-Cordobas, 981 F.2d at 1214 (partial omission of closing arguments does not warrant reversal); see also *United States* v. *Stefan*, 784 F.2d 1093, 1102 (11th Cir.) (one hour and forty-five minute gap not a "substantial and significant omission" even though omitted bench conference was a "pivotal point in the case"; listing types of omissions that would merit a new trial, but not including rebuttal argument), cert. denied, 479 U.S. 855 and 1009 (1986); *United States* v. *Colmenares-Hernandez*, 659 F.2d 39, 43 (5th Cir.) (omission of testimony of government's rebuttal witnesses not a "substantial and significant omission of the transcript justifying reversal"), cert. denied, 454 U.S. 1127 (1981); *Selva*, 559 F.2d at 1306 n.5 (while omission of all closing arguments warrants reversal, smaller gaps in transcript may not).[7]

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[7] See also *Bransford* v. *Brown*, 806 F.2d 83, 86 (6th Cir. 1986) (petitioner must present more than gross speculation that missing transcripts were necessary to a fair appeal), cert. denied, 481 U.S. 1056 (1987). Petitioner's reliance on *Hardy* v.

Moreover, because the evidence of petitioner's guilt was overwhelming, see Pet. App. A7-A8, A23, the court of appeals reasonably concluded that, despite any "imaginable error" that might have occurred during rebuttal, there was no substantial chance that the jury would have acquitted and thus there was no plain error. *Id.* at A8; see also *Preciado-Cordobas*, 981 F.2d at 1214-1215 (under "substantial and significant" test, omission was harmless in light of overwhelming evidence of defendant's guilt).

2. Petitioner also contends (Pet. 15-21) that the Due Process Clause required the prosecution to correct the allegedly false testimony of its witness, Jorge Hernandez Miller, about his motivation for testifying, even though the testimony was not elicited or relied upon by the prosecution, and defense counsel was aware of the inconsistency and exposed it during cross-examination. The court of appeals correctly rejected that fact-bound claim, and its decision is not in conflict with any decision of this Court or of other courts of appeals.

The prosecution's knowing failure to correct false testimony violates the Due Process Clause when the false testimony is material and thus reasonably could have affected the judgment of the jury. *Napue* v. *Illinois*, 360 U.S. 264, 269-271 (1959). But no such violation occurred in this case because the govern-

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United States, 375 U.S. 277 (1964), is misplaced. *Hardy* ruled that indigent defendants must be provided the same access to trial transcripts as non-indigent defendants. *Id.* at 279-282. This case does not involve disparate treatment between paying defendants (like petitioner) and *in forma pauperis* defendants. Rather, it involves the distinct question of whether reversal is required when the only transcript that can be reconstructed is less than a verbatim account.

ment fully disclosed the impeachment evidence to the defense; the defense exploited that information in cross-examination; and the witness's admissions during that cross-examination revealed the substance of the facts that the witness had allegedly concealed.

When Miller agreed to testify on behalf of the government, the prosecution informed the defense and the district court that Miller had stated that he was pleading guilty because "he thought that he was going to be imputed with some murders * * * which he denies, and * * * [that] he wanted to clear the record that in fact he did not participate in those murders." Pet. App. A12.[8] Before trial, the district court ruled that evidence of the murders was too prejudicial to be admitted, but that the defense could refer to the murders in cross-examining Miller about his motives to enter into the plea agreement. *Id.* at A11. On cross-examination, Miller claimed that he was testifying because he desired to "repent" and "tell the truth." *Id.* at A13. Under lengthy questioning, however, Miller acknowledged that other factors influenced his decision to testify. See *Id.* at A14 (Miller concedes that the plea agreement meant that "if I speak about things of which I have knowledge or in which I have taken part, I wouldn't be indicted for them" and "would be sentenced to fewer years").[9]

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[8] Miller separately and additionally advised defense counsel that he was afraid "the government . . . [was] going to bring a massacre against him, a murder against him, but he also stated to [defense counsel] that in fact he did not do that." Pet. App. A12.

[9] See also C.A. App. 194-195 (Miller admits that he is testifying because "I have three daughters and a wife I love" and "I would like to return to my family before too many years go by"); *id.* at 195 ("I was told quite clear that if I testified I

That cross-examination thus effectively exposed that Miller's motives to cooperate included avoiding prosecution on crimes he revealed as well as obtaining a more lenient sentence. At the conclusion of cross-examination, defense counsel "made no indication to the court" that the government was under an obligation to clarify Miller's statements further and, instead, "indicated satisfaction with coverage of the issue." *Id.* at A13 n.7.

This, accordingly, is not a case in which the government elicited, adopted, or affirmatively used or argued perjured testimony. Nor did the government suppress or withhold impeachment evidence; to the contrary, the prosecution disclosed Miller's testimonial motive to the defense and "defense counsel knew virtually as much about that subject as the prosecution did." *Spaziano* v. *Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994), cert. denied, 115 S. Ct. 911 (1995). Under these circumstances, the court of appeals correctly ruled that the government had no obligation to "correct" the record by confirming what cross-examination had already exposed. Cf. *Gilday* v. *Callahan*, 59 F.3d 257, 268 (1st Cir. 1995) (no error where, even though witness denied existence of deal with government, his acknowledgement at trial of "a generalized expectation of leniency" served to disclose possible motivation to testify favorably for government), cert. denied, 116 S. Ct. 1269 (1996); *Tejada*

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would be sentenced to fewer years."); *id.* at 197.1 (in response to counsel's question that "as part of your cooperation, they would not prosecute you for those things that you told them about over which they had no independent evidence?", Miller responds "That is right."); *id.* at 197.2 (Miller states that testimony was, in part, "[f]or my wife"); Gov't C.A. Br. 30-33 (further outlining cross-examination testimony).

v. *Dugger*, 941 F.2d 1551, 1557 (11th Cir. 1991) (where defense knew of and exposed inconsistencies in testimony on cross-examination, false testimony could not have affected jury's verdict), cert. denied, 502 U.S. 1105 (1992).[10]

3. Finally, petitioner contends (Pet. 21-26) that the court of appeals abused its discretion when it declined to reverse his conviction because of the district court's failure to instruct the jury that it could draw no adverse inference from petitioner's failure to testify. The district court's failure to give the "no-adverse-inference" instruction requested by petitioner was erroneous. *Carter* v. *Kentucky*, 450 U.S. 288, 300 (1981); see also *James* v. *Kentucky*, 466 U.S. 341, 344 (1984) (same). Because petitioner did not object to the jury instructions, however, review is limited to plain error under Fed. R. Crim P. 52(b). *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Under that standard, the defendant must show the existence of an obvious error that affected substantial rights. Even then, the court of appeals retains discretion whether to correct the error, and it should

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[10] Petitioner's reliance (Pet. 18-21) on *United States* v. *Wallach*, 935 F.2d 445 (2d Cir. 1991); *United States* v. *Foster*, 874 F.2d 491 (8th Cir. 1988); and *United States* v. *Iverson*, 648 F.2d 737 (D.C. Cir. 1981), is misplaced. In *Wallach* and *Foster*, the government both elicited the perjured testimony and relied upon it in closing. *Wallach*, 935 F.2d at 455, 458-459; *Foster*, 874 F.2d at 494-495. Furthermore, in *Foster*, the prosecutor misrepresented the undisclosed fact to the court in responding to a jury question. 874 F.2d at 495. *Iverson* simply remanded for a hearing in the district court concerning defense counsel's knowledge of undisclosed information, without finding any due process violation, in a case where the witness's perjury was not exposed during cross-examination and the prosecution relied on the false information at summation. 648 F.2d at 739 & n.10.

not exercise that discretion unless the error "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings." *Id.* at 734, 736.[11]

The court of appeals correctly exercised its discretion here. It concluded that "the uncontradicted evidence against [petitioner], from the testimony of several co-conspirators involved in various aspects of the scheme, was overwhelming," and that the jury would have rendered the same verdict "regardless of the [district court's instructional] error." Pet. App. A23. In those circumstances, the instructional error did not "seriously affect[] the fairness of the proceedings," *ibid.*, and the court of appeals did not abuse its discretion in declining to reverse. Petitioner identifies no decision that conflicts with that holding.

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[11] This Court has not yet determined whether, if the objection is properly preserved, the court's failure to provide a no-adverse-influence instruction is amenable to "harmless error" review. See *James*, 466 U.S. at 351. Because this case arises under a plain error standard of review, that issue is not presented. In any event, petitioner's principal claim (Pet. 23-25) seems to be only that the error was not harmless on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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